

REMARKS/ARGUMENTS

Prior to entry of this Amendment, claims 30-34, 39, 40 and 42-49 were present for examination. Claim 43 has been canceled. No claims have been amended or added. Therefore, claims 30-34, 39, 40, 42 and 44-49 are present for examination, and claims 30 and 40 are the independent claims.

Claims 30-34, 39, 40, 42 and 44-49 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the cited portions of U.S. Patent No. 6,169,894 to McCormick et al. (“McCormick”), in view of the cited portions of U.S. Patent No. 5,650,994 to Daley (“Daley”). The Applicants respectfully request reconsideration for the reasons that follow.

35 U.S.C. § 103(a) Rejections

The Office Action rejected independent claims 30 and 40 under 35 U.S.C. § 103(a) as being unpatentable over McCormick in view of Daley. To establish a *prima facie* case of obviousness, the prior art references must “teach or suggest all the claim limitations.” MPEP § 2143. The Applicants respectfully submit that the cited references do not teach or suggest all of the limitations of the independent claims.

Missing Claim Limitations

Specifically, neither McCormick nor Daley can be relied upon to teach or suggest either (1) “establishing a second wireless channel upon which to broadcast the selected media program to the second wireless handset, wherein the second wireless channel is different than the first wireless channel”; or (2) basing that channel establishment upon a determination of “whether the second wireless handset is in the cell site coverage area.” Both of these recitations are found in claims 30 and 40.

The Office Action properly admits that McCormick fails to teach both of these limitations. Instead, the Office Action relies on the teachings of Daley at col. 53, ll. 1-10. Office Action, pp. 2 and 6 (the Office Action cites col. 5, however, the Applicants believe the correct citation to be col. 53 to find the recitations of claims 30 and 40). Daley, however, teaches that “[staggercast] provides a broadcast of a particular program on a regular interval basis, such as every 15 minutes, over multiple channels . . .”

In fact, Daley appears at best to teach multiplexing multiple channels through a single *wired* transport medium and *without regard to any particular determination*. This is different from both “establishing a second *wireless* channel” and basing that channel establishment upon determining “whether the second wireless handset is in the cell site coverage area,” as recited in claims 30 and 40.

Thus, both McCormick and Daley fail to teach or suggest all of the recitations of claims 30 and 40, either alone or in combination. For at least these reasons, the Applicants believe claims 30 and 40 to be allowable.

Motivation To Combine

Moreover, the basic test for establishing obviousness requires that to “establish a *prima facie* case of obviousness . . . there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings The teaching or suggestion to make the claimed combination . . . must . . . be found in the prior art, not in the applicant’s disclosure.” MPEP § 2143. Here, there is no suggestion or motivation in the references to modify the teachings of McCormick to include Daley. The Office Action instead relies on the contention that it would be obvious to combine McCormick and Daley simply because the arts of the two references are allegedly analogous. Office Action, pp. 2 and 6. This reasoning fails to provide the requisite motivation to combine the references for at least three reasons.

First, the Supreme Court recently set forth certain principles that discourage such conclusory statements. KSR Int'l Co. v. Teleflex Inc., (Sup. Ct. U.S., No. 04-1350, 4/30/07).

The Court recognized the importance of looking to:

interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to **combine** the known elements ***in the fashion claimed*** by the patent at issue. To facilitate review, this analysis ***should be made explicit***. Id., slip op. at 14 (emphasis added).

The Court, moreover, reaffirmed the principle that “rejections on obviousness grounds ***cannot be sustained by mere conclusory statements***.” Id., citing In re Kahn , 441 F. 3d 977, 988 (CA Fed. 2006) (emphasis added).

Second, the art of Daley is completely different from the art of either McCormick or the present application. Specifically, Daley relates to wired data networks, such as a video dial tone network (See, e.g., Daley, col. 4, ll. 44-52). Therefore, Daley does not contemplate many of the issues inherent with mobile wireless networks. For example, while the endpoints and nodes of mobile wireless networks are constantly changing their geographic locations, those elements of the wired network in Daley appear to be geographically fixed (e.g., the video data center 110 and the subscriber site 126 in Figs. 3 and 6, respectively).

Third, any motivation to combine the references would be negated by suggestions of McCormick, which appears to teach away from the recitations of the present application. For example, McCormick teaches that “multiple users may be using the ***same*** broadcast channel to receive the same information,” requiring certain signals to be muted to avoid interference issues. Thus, McCormick appears to suggest away from “establishing a ***second*** wireless channel . . . wherein the second wireless channel is different than the first wireless channel,” as recited in claims 30 and 40.

Thus, because there is no requisite suggestion or motivation in the references to modify the teachings of McCormick to include Daley, the Applicants believe claims 30 and 40 to be allowable.

Dependent Claims

The Applicants respectfully submit that the specified recitations in claims 30 and 40 are allowable for at least the foregoing reasons. Claims 31-34, 39, 42 and 44-49 each depend from an allowable base claim, and are believed allowable for at least the same reasons as given above. The Applicants, therefore, respectfully request that the § 103(a) rejections to these claims be withdrawn.

Conclusion

In view of the foregoing, the Applicants believe all claims now pending in this application are in condition for allowance. The issuance of a formal Notice of Allowance at an early date is respectfully requested.

If the Examiner believes a telephone conference would expedite prosecution of this application, please telephone the undersigned at 303-571-4000.

Respectfully submitted,

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